

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In re Applications of) MM Docket No. 90-406
)
PENSACOLA RADIO PARTNERS) File No. BPH-880323MJ
)
VERNON C. FLOYD) File No. BPH-880324MK
)
MIRACLE RADIO, INC.) File No. BPH-880324NU
)
DAVID EARL HOXENG d/b/a) File No. BPH-880324OJ
ADX COMMUNICATIONS)
OF PENSACOLA)
)
For Construction Permit for a)
New FM Station, Channel 254C2)
Pensacola, Florida)

O R D E R

Adopted: April 30, 1998 ; Released: May 12, 1998

By the Commission:

1. This Order grants a Joint Motion for Approval of Settlement Agreements and Dismissal of Applications filed October 20, 1997 by ADX Communications of Pensacola ("ADX"), Miracle Radio, Inc. ("Miracle"), and Pensacola Radio Partners ("PRP"), and affirms the denial of the application of Vernon C. Floyd for lack of financial qualifications. The Joint Motion contemplates a resolution of this proceeding whereby Miracle and PRP would dismiss their applications in exchange for monetary consideration from ADX, and ADX's application would be granted.

I. BACKGROUND

2. This proceeding involves applications for a new FM broadcast station in Pensacola, Florida. In an Initial Decision ("I.D."), Pensacola Radio Partners, 8 FCC Rcd 7225 (ALJ 1993), Administrative Law Judge John M. Frysiak ("ALJ") found that Floyd was financially disqualified and that, among the remaining applicants, PRP was comparatively superior. After exceptions were filed with the Review Board, the proceeding was frozen by the Commission's Public Notice, FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994), in light of the decision of the court of appeals in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), holding that the integration

of ownership criterion used by the Commission to decide among competing applicants was unlawful. Although not made the subject of an express condition, the settlement agreements recognize that Floyd's application would have to be denied in a final Commission order before ADX's application can be granted pursuant to the Joint Motion.¹ This understanding comports with current Commission freeze policy because affirmance of Floyd's disqualification would allow for termination of the proceeding under the proposed settlement. See Modification of FCC Comparative Proceeding Freeze Policy, 9 FCC Rcd 6689 (1994) (Commission will adjudicate basic qualification issues in frozen cases only where proposed settlement of proceeding is contingent on such issue resolution).

II. DISCUSSION

A. Qualifications of Floyd

3. After review of the record below, we agree with the I.D.'s disqualification of Floyd.² Floyd is the licensee and sole proprietor of radio stations WORV(AM) and WJMG(FM), Hattiesburg, Mississippi. Floyd certified in his application that he had net liquid assets on hand to meet his costs and indicated that he was in the process of assembling documentation of the availability of those assets.³ In response to a motion filed by PRP and Miracle, the ALJ enlarged the hearing issues to determine whether Floyd was financially qualified at the time he certified his financial qualifications. See Pensacola Radio Partners, 8 FCC Rcd at 7225 ¶5. At hearing, Floyd estimated his costs of construction and three months of operation at \$260,527 and proposed to meet these costs primarily from the proceeds of the sale of his radio stations. Floyd developed his own estimate of the stations' fair market value, but the ALJ rejected Floyd's estimate because it was uncorroborated. 8 FCC Rcd at 7228 ¶26 and 7237 ¶107. Floyd also relied on a formal appraisal of the stations' value by Susan Harrison, a communications consultant, whom Floyd retained on the day he signed the certification, but whose appraisal was not prepared until months later. The ALJ concluded, however, that Harrison's appraisal was unreliable. The ALJ noted that Harrison never inspected the stations and did not take account of such important factors as market size, program format, service area, ratings, staffing, and whether Floyd paid himself a salary. She also did not reduce the value of the stations to reflect the 20% or greater discount typically available in cash transactions. Id. at 7229 ¶¶30-31 and 7237 ¶109. Instead, the ALJ accepted the appraisal provided by Charles Giddens, president of Media Venture Partners, a brokerage,

¹See Mass Media Bureau Comments on Joint Motion at 2 n. 1.

²Upon elimination of the Board, effective April 24, 1996, this proceeding was certified to the Commission. See Pensacola Radio Partners, 11 FCC Rcd 5256 (Rev. Bd. 1996).

³At the time Floyd filed his application, the Commission permitted applicants simply to certify, rather than to document, their financial qualifications. See Revision of Form 301, 50 R.R.2d 381, 382 (1981).

appraisal, and analysis firm, which was the largest broadcast transaction mergers and acquisition business at the time of the hearing. Giddens took into account pertinent factors lacking in the Harrison appraisal. The firm had conducted several hundred appraisals, and Giddens, a broadcast station owner, had considerable personal experience in appraising broadcast properties. He had also spoken at broadcast industry functions on the methodology and mechanics of broadcast station evaluation. Giddens estimated that a cash transaction would produce in the range of \$200,000 to \$216,000 for Floyd's stations. *Id.* at 7229 ¶¶32-33, 35 and 7237 ¶109.

4. Although Floyd also attempted to establish his financial qualifications by placing reliance on cash on hand in his personal savings and checking accounts and his stations' checking account, which totaled \$143,000, the ALJ declined to consider this evidence. The ALJ pointed out that Floyd's deposition testimony only stated that he planned to rely on "proceeds from the existing stations" to finance the proposal and did not mention the use of cash on hand. *Id.* at 7228 ¶28; tr. 1182-83. In addition, the ALJ found that Floyd provided no showing of his financial assets and liabilities to support his ability to meet his commitment. 8 FCC Rcd at 7236-37 ¶105.

5. In adopting the certification procedure, the Commission emphasized that it was not modifying its basic substantive financial requirements or changing the factual basis for meeting those requirements. See Revision of Form 301, 50 R.R.2d at 382; Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301), 4 FCC Rcd 3853, 3858 (1989). To establish reasonable assurance of financial qualifications at the time of certification, an applicant "must provide substantial and reliable evidence" of sufficient net liquid assets on hand, or committed sources of funds. Northampton Media Associates, 4 FCC Rcd 5517, 5519 (1989); recon. denied, 5 FCC Rcd 3075 (1990); aff'd, Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991). The Commission requires "probative evidence" of financial ability, and reliance on the self-serving, uncorroborated statement of the person responsible for certifying the applicant's financial qualifications that he "took the appropriate steps" to secure the needed funds is not sufficient. *Id.*; Aspen FM, Inc., 6 FCC Rcd 1602, 1603 (1991). Where the funding source is an individual, rather than a financial institution, the applicant must provide evidence, such as a balance sheet or financial statement, that its source had sufficient net liquid assets at the time of certification to provide the funds. Northampton, 4 FCC Rcd at 5519; Short Broadcasting Co., Inc., 8 FCC Rcd 5574, 5576 (Rev. Bd. 1993). It is well established that these standards apply to all applicants utilizing the financial certification process. See Mission Broadcasting Corp. v. FCC, 113 F.3d 254, 260 (D.C. Cir. 1997) (rejecting claim that Commission failed to give adequate notice of its financial requirements).

6. Moreover, although not directly applicable to Floyd, it is noteworthy that the Commission has more recently strengthened the certification process by amending Form 301 to require that applicants submit additional information about their financial qualifications and, as it did prior to certification, the Commission now requires that applicants have their underlying documentation verifying their funding on hand at the time they submit their applications. "We

stress that when the applicant checks the box on Form 301 that it is financially qualified, it must have at that time sufficient liquid assets in excess of current liabilities and/or sufficient funds available from committed sources to construct and operate the facility." Revision of Application for Construction Permit for Commercial Broadcast Station, 4 FCC Rcd at 3859. To provide guidance to applicants on the funding information required, the Commission added to its current instructions for Form 301 the instructions it formerly used to elicit financial information and documentation. "Pursuant to these instructions, documentation that establishes an applicant's financial qualifications includes . . . a balance sheet of the applicant; . . . [and] financial statements for all persons who agreed to furnish funds . . ." Id. at 3859 n. 68. Balance sheets and financial statements must be detailed. Id. at 3864 (Instructions for Section III - Financial Qualifications).

7. In his exceptions, Floyd principally argues that the ALJ erred in refusing to consider Floyd's testimony that he would use his personal funds to finance the station. We disagree. As the ALJ concluded, Floyd could not place reliance on his personal funds because Floyd simply failed to provide a balance sheet or other documentary evidence establishing that he had sufficient net liquidity at the time of certification to furnish the needed funds. For example, although Floyd relies, in part, on his stations' bank account, he did not document the stations' current liabilities including pre-existing or ongoing expenses such as salaries, taxes, and the costs of litigating this proceeding. Likewise, with regard to cash in his personal bank accounts, Floyd made no showing of his financial assets and liabilities, which would permit an independent determination of his net liquidity.

8. Floyd maintains, however, that he established the necessary liquidity to meet Commission requirements by virtue of his unchallenged testimony that he had no outstanding debts. In this regard, Floyd claims that, because he is an individual applicant not relying on third party funding who is familiar with his own assets and intentions, his testimony should be accepted as sufficient to establish his financial qualifications. We disagree that Floyd's showing satisfies Commission standards. First, Floyd cites no cases where we have held that the Northampton standards summarized in ¶ 5, supra, are inapplicable to individual applicants relying on their own funds. As indicated, the requirement for documentation of financial wherewithal including a showing of sufficient liquid assets in excess of current liabilities has been a continuing staple of the Commission's financial qualifications standards both before and since certification was instituted. Certification did not change the Commission's substantive or evidentiary requirements. Second, Floyd's hearing exhibit is insufficient to prove that he is in the financial position he claims for himself. Although Floyd claims that he owns all his assets "free and clear" of any debt, his exhibit mentions specifically only Floyd's "home, other investment properties, and the stations."⁴ Because Floyd is arguing that, in effect, his testimony

⁴Floyd Phase II, Exh. 1, page 4 ¶ 7. Although Floyd also refers to his hearing testimony, the transcript citations in his exceptions do not support his contention.

should be accepted as tantamount to a balance sheet, we believe he was obliged to provide in his testimony the same level of detail as would appear on a financial statement. In fact, however, Floyd's exhibit makes only a single passing reference to the status of certain assets and does not purport to make a complete showing of all of his liabilities. The Commission requires objective verification that an applicant has the funding it claims to have. See Sunshine Broadcasting, Inc., 6 FCC Rcd 5981, 5982-83 (Rev. Bd. 1991), recon. denied, 7 FCC Rcd 493 (Rev. Bd. 1992) (testimony that individual lenders had sufficient cash in bank accounts, absent documentation in form of financial statements showing net liquid assets, not sufficient to establish financial qualifications). In the absence of a balance sheet or other documentation, and because his testimony was not sufficiently detailed to show that he owned all his assets outright or to describe all his liabilities, Floyd's bank statements alone were not enough to establish that he "had the necessary financial resources at [the] time" of certification to construct and operate the proposed station. See Northampton, 4 FCC Rcd at 5519.

9. We also disagree with Floyd that the ALJ should have accepted Floyd's uncorroborated, self-serving opinion of the market value of his Hattiesburg stations to establish his financial qualifications. Although Floyd argues that his own valuation was reasonable and made in good faith (Exceptions, at pp. 14-16), Commission precedent is clear that an applicant who seeks to rely on the proceeds from the sale of non-liquid assets as a source of funds must provide a valid appraisal of the value of those assets at the time of certification. See Rose Broadcasting Co., 68 FCC 2d 1242, 1246 (1978); Capitol City Broadcasting Co., 9 FCC Rcd 7861, 7863 (Rev. Bd. 1994), rev. denied, 10 FCC Rcd 3197 (1995), aff'd by judgment, No. 96-1481 (D.C. Cir. November 3, 1997) (applicant's self-serving self-appraisal of non-liquid assets rejected in absence of independent appraisals establishing property values at time of certification); see also CHM Broadcasting L.P. v. FCC, 24 F.3d 1453, 1458 & n.3 (D.C. Cir. 1994) (Commission practice of requiring objective evidence to support claim of sufficient financial ability is reasonable). Floyd cannot look to Harrison for confirmation of his own valuation because, as the ALJ found, Harrison's estimate did not consider pertinent information affecting the stations' fair market value. The only evidence in the record of a valid independent appraisal of the value of Floyd's stations is that provided by Giddens, an experienced appraiser, who estimated the likely proceeds of a sale as at most between \$200,000 and \$216,000, after adjusting the market value to take account of such relevant factors as station format, location, salaries, and the discount feature in cash transactions. See Port Huron Family Radio, Inc., 5 FCC Rcd 4562, 4563 n. 5 (1990) (Commission practice is to reduce market valuation by as much as one-third because net proceeds from non-liquid assets are normally less than fair market value). Floyd does not specifically except to the ALJ's acceptance of Giddens's appraisal, which Floyd characterizes as a "reasonable estimate" (Exceptions, at p. 18), and the ALJ correctly concluded that, based on Giddens's estimate, the record established that the likely proceeds from a station sale alone would be insufficient to meet Floyd's anticipated costs. Floyd is not financially qualified.

B. Settlement Agreement

10. In opposing the Joint Motion, Floyd argues that the settlement differs from those recently approved by the Commission in Global Information Technologies, Inc., 12 FCC Rcd 11808 (1997), and Gonzalez Broadcasting, Inc., 12 FCC Rcd 12253 (1997), because the non-settling parties in those cases already had their exceptions ruled on by the Board, and those settlements were expressly contingent upon dismissal of the non-settling parties. Floyd also contends that, in view of Section 3002(a)(3) of the Balanced Budget Act of 1997 ("Balanced Budget Act"), Pub. L. No. 105-33, 111 Stat. 251 (1997), expressing Congressional policy favoring competitive bidding for broadcast spectrum, it would be in the public interest to permit Floyd to participate in an auction for the Pensacola station. An auction would also accelerate the delivery of broadcast service, Floyd maintains. In this regard, Floyd adds that the agreement between ADX and Miracle runs counter to public policy because it provides, if the Commission does not approve the agreement, that ADX will not participate in an auction, thereby reducing the field of potential bidders.

11. The Joint Motion complies with the provisions of 47 U.S.C. §311(c) and 47 C.F.R. §73.3525(a) governing settlement agreements. The applicants have provided declarations under penalty of perjury that their applications were not filed for the purpose of reaching or carrying out a settlement agreement, and that approval of the agreements will serve the public interest by expediting the commencement of a new broadcast service in Pensacola, Florida. The amount of the payment to be made by ADX to Miracle and PRP is of no consequence inasmuch as Congress in the Balanced Budget Act has directed the Commission to waive any provision of our rules necessary to allow for settlement of frozen comparative hearing cases. See ¶12, infra; Gonzales Broadcasting, Inc., 12 FCC Rcd at 12255-56 §10. Floyd's objection to the settlement on the ground that, unlike recent cases, he has not had Commission review of his exceptions is answered by our affirmance of the I.D.'s denial of his application under the financial qualifications issue. Also, as in those cases, because the agreements are, in effect, contingent upon Commission denial of Floyd's application, they allow for a final resolution of this proceeding.

12. We also see no inconsistency between approval of the settlement and Section 3002(a)(3) of the Balanced Budget Act. Section 3002(a)(3) added Section 309(l) to the Communications Act of 1934. Section 309(l) authorizes the Commission to conduct competitive bidding proceedings with respect to competing applications for construction permits for new commercial broadcast stations that were filed before July 1, 1997. Section 309(l) also provides that, for a 180-day period, the Commission "shall waive any provisions of its regulations necessary" to permit these applicants to enter into settlement agreements. Thus, the statute clearly provides a 180-day window for applicants who filed before July 1, 1997 to voluntarily remove the conflict between their applications and encourages settlement through its waiver mandate. The settling parties have acted within the statutory framework. Contrary to Floyd's assertion, approval of the settlement will expedite broadcast service to Pensacola without the need for an auction. Finally, the provision of the agreement between ADX and Miracle pertaining to ADX's participation in an auction is of no effect in light of our approval of the settlement.

III. ORDERING CLAUSE

13. ACCORDINGLY, IT IS ORDERED, That the Joint Motion for Approval of Settlement Agreements and Dismissal of Applications filed October 20, 1997 by ADX Communications of Pensacola, Miracle Radio, Inc., and Pensacola Radio Partners IS GRANTED and the attached settlement agreements ARE APPROVED; that the Motion for Leave to File Supplement, filed February 6, 1998 by ADX Communications of Pensacola, and the Motion for Leave to file Consolidated Opposition, filed February 19, 1998 by Vernon C. Floyd, ARE GRANTED and the associated pleadings ARE ACCEPTED;⁵ that the exceptions filed November 10, 1993 by Vernon C. Floyd ARE DENIED and the exceptions filed November 10, 1993 by Pensacola Radio Partners, Miracle Radio, Inc., and ADX Communications of Pensacola ARE DISMISSED as moot; that the motions to strike filed November 30, 1993 by Pensacola Radio Partners and December 9, 1993 by Miracle Radio, Inc. ARE DISMISSED as moot; that the motion for leave to amend filed February 29, 1994 by ADX Communications of Pensacola IS GRANTED and the amendment IS ACCEPTED; that the application of Vernon C. Floyd (File No. BPH-880324MK) IS DENIED and the applications of Pensacola Radio Partners (File No. BPH-880323MJ) and Miracle Radio, Inc. (File No. BPH-880324NU) ARE DISMISSED; that the application of ADX Communications of Pensacola (File No. BPH-880324OJ) IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁵In the interest of compiling a full record, we have permitted the parties to file supplemental pleadings.

